

15-0852

IN THE CIRCUIT COURT OF  
OHIO COUNTY, WEST VIRGINIA

NICOLE A. SCARCELLI,

Plaintiff.

vs.

RAJAI T. KHOURY, M.D., and  
KHOURY SURGICAL GROUP, INC.,  
a West Virginia Corporation

Defendants.

CIVIL ACTION NO. 15-C-90

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS BASED UPON  
FORUM NON CONVENIENS**

On the 26<sup>th</sup> day of June, 2015, came Plaintiff Nicole Scarcelli by her attorney, Brent E. Wear of Fitzsimmons Law Firm PLLC and, as well, came Defendants, Rajai T. Khoury, M.D., and Khoury Surgical Group, Inc., by their attorneys, David T. Givens and Joseph R. Blalock of Flaherty Sensabaugh & Bonasso PLLC, for a hearing on *Defendants' Motion to Dismiss for Forum Non Conveniens*. Having fully considered the pleadings, the parties' arguments and authorities, other materials filed by the parties, and the entire record herein, the Court makes the following findings of fact with respect to the motion, and the following conclusions of law and order with respect to Defendants' motions to dismiss based upon *forum non conveniens*:

**FINDINGS OF FACT**

1. This case arises from Dr. Khoury's removal of Nicole Scarcelli's clavicle bone instead of the removal of her right first rib during the surgery to treat Nicole Scarcelli's thoracic outlet syndrome.

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2. On May 28, 2013, Nicole Scarcelli underwent a scheduled "right first rib resection" at East Ohio Regional Hospital in Belmont County, Ohio, performed by Dr. Khoury. During the May 28, 2013, surgery, Dr. Khoury removed Nicole Scarcelli's clavicle bone instead of her right first rib. On May 30, 2013, Nicole Scarcelli was discharged from East Ohio Regional Hospital with a discharge diagnosis from Dr. Khoury of "Right thoracic outlet syndrome status post right 1<sup>st</sup> rib resection."

3. On May 31, 2013, Dr. Khoury sent a letter from Dr. Khoury's office and principle place of business in Ohio County, West Virginia, to Nicole Scarcelli's family physician enclosing a copy of the operative report and stated: "Your patient Nicole Scarcelli underwent a right 1<sup>st</sup> rib resection on May 28, 2013 at East Ohio Regional Hospital."

4. Plaintiff contends the May 31, 2013, letter directed to Plaintiff's family doctor, misrepresented the status and condition of Nicole Scarcelli, constituting tortious conduct. Thus, the defendants committed tortious conduct both in West Virginia, as well as Ohio, and Plaintiff asserts this tortious conduct committed in this forum serves as a basis for Plaintiff's claims of intentional infliction of emotional distress, misrepresentation and punitive damages.

5. Plaintiff also contends that Dr. Khoury continued to misdiagnose Nicole Scarcelli in West Virginia with a resected right first rib, when in fact she had a resected right clavicle, and Dr. Khoury improperly ordered that Nicole Scarcelli undergo physical therapy despite his misdiagnosis of her medical condition causing her further injury and damage.

6. After seeking a second opinion, Nicole Scarcelli was referred to the Cleveland Clinic where it was discovered that Dr. Khoury had removed the clavicle during the May 28, 2013, surgery, and not the first rib. Thereafter, Nicole Scarcelli underwent an operation on

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September 5, 2013, wherein Plaintiff had her right first rib resected, which was reported as having been removed by Dr. Khoury during the initial surgery of May 28, 2013.

7. Plaintiff filed her Complaint including claims for Medical Negligence (Count One), Battery (Count II), Lack of Informed Consent (Count Three) and Intentional Infliction of Emotional Distress (Count Four).<sup>1</sup>

8. On or about April 16, 2015, Defendants filed their Motion to Dismiss and simultaneously filed a Motion for Protective Order pending this Court's ruling on the Motion to Dismiss. On June 23, 2015, Plaintiff filed her Response in Opposition to the Motion to Dismiss and further filed a Response in Opposition to Defendants' Motion for Protective Order. On or about June 25, 2015, Defendants filed their Reply in support of their Motion to Dismiss.

9. On June 26, 2015, the Court heard argument on the pending motion to dismiss pursuant to the West Virginia's *Forum non conveniens* statute, *W.Va. Code § 56-1-1a*.

## CONCLUSIONS OF LAW

10. Venue for a cause of action lies in the county wherein the cause of action arose or in the county where the defendant resides. *W.Va. Code §56-1-1(a)(1)*.

11. Being that Dr. Khoury is a resident of Ohio County, West Virginia, and practices medicine at Defendant Khoury Surgical Group, Inc., also located in Ohio County at 20 Medical Park, Suite 203, Wheeling, West Virginia, Plaintiff properly instituted this civil action in the Circuit Court of Ohio County, West Virginia, pursuant to *W.Va. Code §56-1-1(a)(1)*.

12. Defendants incorrectly suggest that the venue choice of Ms. Scarcelli, as an out-of-state plaintiff, is not entitled to statutory deference. Because the cause of action for Plaintiff's

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<sup>1</sup> On March 25, 2015, Plaintiff filed her Amended Complaint to correct a typographical error with respect to a date of treatment referenced in the Original Complaint. All other aspects of the Amended Complaint are identical to the original Complaint and all references herein are being made to the Amended Complaint.

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injuries and damages arose, in part, from tortious conduct committed in Ohio County, West Virginia, statutory deference applies to Ms. Scarcelli's selection of the forum:

[T]he statute plainly states that, in cases in which the plaintiff is not a resident of West Virginia and the cause of action did not arise in West Virginia, the "great deference" typically afforded to a plaintiff's choice of forum "may be diminished." Nothing in the statute requires a court to diminish, or abolish altogether, the deference it normally affords a plaintiff's choice of forum. Rather, it permits courts to do so, when the precedent factors have been met.

*State ex rel. Mylan, Inc. v. Zakaib*, 227 W.Va. 641, 648, 713 S.E.2d 356, 363 (2011).

13. There is no requirement that the deference given to the Plaintiff's choice of forum be diminished, and should not be diminished in light of the facts of this case and the meaningful connections West Virginia has to this matter, including, but not limited to, tortious conduct occurring in Ohio County, West Virginia, and the Defendants both being domiciled in Ohio County.

14. With the preference afforded to Ms. Scarcelli's choice of forum in mind, the court "must consider the eight factors enumerated in West Virginia Code § 56-1-1a (Supp. 2010), as a means of determining whether, in the interest of justice and for the convenience of the parties, a claim or action should be stayed or dismissed on the basis of forum non conveniens." *Mylan*, 227 W.Va. at 649.

15. The weight assigned to each factor set forth in *W.Va. Code § 56-1-1a* varies because each case turns on its own unique facts. See *State ex rel. North River Ins. Co. v. Chafin*, 233 W.Va. 289 (2014), citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)(stating that forum non conveniens analysis is highly fact specific).

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(1) Whether an alternate forum exists in which the claim or action may be tried.

16. Based upon the Defendants consenting to personal jurisdiction in Ohio and waiving any applicable statute of limitations defenses, plaintiffs do not dispute that Ohio is an alternate forum.

(2) Whether Maintenance of the Claim or Action in the Courts of This State Would Work a Substantial Injustice to the Moving Party.

17. Plaintiff has asserted that Dr. Khoury was not only negligent during the May 28, 2013, surgery, but also committed tortious conduct thereafter by failing to advise both the Plaintiff and her treating physicians, including her primary care doctor, that he removed the wrong bone.

18. For example, on May 31, 2013, Dr. Khoury sent a letter to Nicole Scarcelli's family physician stating: "Your patient Nicole Scarcelli underwent a right 1<sup>st</sup> rib resection on May 28, 2013 at East Ohio Regional Hospital." Plaintiff contends the May 31, 2013, letter, constitutes an act of misrepresentation, gross negligence and recklessness; and was sent from Dr. Khoury's office and principle place of business located at 20 Medical Park, Suite 203, Wheeling, Ohio County, West Virginia.

19. Plaintiff also contends that this separate act, committed in Ohio County, West Virginia, is a predicate act that supports her claims for intentional infliction of emotional distress, misrepresentation and punitive damages.

20. In addition, Plaintiff asserts the Defendants made further misrepresentations by billing Nicole Scarcelli's insurance for the removal of her rib, when in fact he removed her

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clavicle, and further collected the fee from the surgery here in West Virginia, which Plaintiff again contends are predicate acts to support an award of punitive damages.

21. Plaintiff also alleges, in part, that Dr. Khoury's misrepresentations to Nicole Scarcelli's primary care doctor, Dr. Porsche Beetham, prevented Plaintiff's primary care physician from taking action to prevent further damage and injury to Nicole Scarcelli by cancelling the improper medical treatment ordered by the Defendant following the initial surgery, as well as preventing Plaintiff's primary care doctor from promptly sending the Plaintiff to another surgeon to have the correct surgery performed.

22. As a result, Plaintiff alleges she underwent physical therapy with a resected clavicle causing her extreme pain, suffering and further injury, as well as causing Plaintiff to endure months of pain and suffering while her condition went misdiagnosed.

23. These allegations of the Plaintiff support that Defendants committed tortious conduct in both West Virginia and Ohio, demonstrating that West Virginia has more than a slight nexus to this controversy and, in fact, West Virginia has a meaningful connection to the Plaintiff's claims.

24. In addition, for purposes of this factor, the West Virginia Supreme Court has specifically acknowledged that consideration of the Defendant's domicile is relevant and permissible. *Mylan*, 227 W.Va. at 651.

25. Dr. Khoury is a resident of Ohio County, West Virginia, is licensed to practice medicine in West Virginia, and practices medicine from his offices located in Ohio County, West Virginia. Likewise, Defendant Khoury Surgical Group, Inc. has its principle place of business located in Ohio County, West Virginia.

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26. By choosing to practice medicine in Ohio County, West Virginia, and incorporating in West Virginia, the Defendants have chosen to take advantage of the laws of West Virginia and cannot now complain about being held accountable in this forum for their alleged tortious conduct.

27. Moreover, by transacting business in this state the Defendants developed a reasonable expectation that they would be subject to being named a Defendant in this state's civil justice system for acts occurring both inside and outside of West Virginia.

28. To suggest there is any injustice or inconvenience to the Defendants by being sued in their home county is not supported by the record. Dr. Khoury's residence is approximately 4.71 miles from the Ohio County Courthouse, while his business, Khoury Surgical Group, Inc., is located only approximately 3.58 miles from this Court. In addition, the Ohio County Courthouse is located only several miles (3.85 miles) from where the initial malpractice took place in Belmont County, Ohio.

29. Conversely, to have this case transferred to Belmont County, Ohio, would result in Dr. Khoury having to travel a further distance for trial. (Dr. Khoury's residence is located 14.32 miles from the Belmont County Courthouse, while the Defendant Corporation is located 13.20 miles from said courthouse.)

30. Likewise, the attorneys representing the Defendants have their office located approximately two blocks from the Ohio County Courthouse and meetings between the Defendants and their counsel would presumably also take place at this location in Ohio County.

31. The Defendants are insured under a West Virginia insurance policy and the claim is being adjusted by West Virginia insurance adjustors according to West Virginia laws and

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insurance regulations, providing yet additional evidence that West Virginia has more than a slight nexus to this matter.

32. With respect to the location of witnesses, the key witness in this matter, Dr. Khoury, is located in Ohio County, West Virginia, and Plaintiff's medical records from his office are also located in this forum. As for the Plaintiff and any lay witnesses the Plaintiff may designate to testify at trial who are not residents of this state, Plaintiff has represented that these witnesses will voluntarily appear at trial resulting in no injustice or prejudice to the Defendants. Additionally, the Plaintiff has retained expert witnesses and provided the Defendants with expert reports pre-suit. Plaintiff's expert economist is located in West Virginia, while Plaintiff's other experts who are out of state (and notably also not residents of Ohio), have agreed to testify at trial, barring any unforeseen circumstances, again resulting in no prejudice to the Defendants.

33. The fact that some treating physicians are located in the state of Ohio is not a sufficient basis to conclude that litigating this claim in this forum will result in substantial injustice to the defendants.

34. Plaintiff has already provided all medical records to the Defendants pre-suit and has represented to the Court she will further execute an authorization permitting the Defendants to obtain any additional records needed.

35. Also, in light of the fact that Ohio County is a border county to the State of Ohio, this Court and counsel for the parties regularly encounter this issue with ease in practically every tort claim that is filed. There is not a considerable distance between this forum and Belmont County, Ohio, that would render interstate discovery and procuring the voluntary attendance of nonparty witnesses for depositions and trial more complicated or expensive. It is also not uncommon for the parties to take the depositions of treating physicians, and if they are



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designated to testify at trial and are unable to testify live at trial, counsel for the parties regularly take evidentiary depositions of these witnesses via videotape to be used at trial.

36. The Defendants have not provided this Court with anything but mere speculation that litigating this matter in this forum would restrict their access to proof or result in an unreasonable burden or expense.

37. Based upon the facts that suit was brought in the county where the Defendants reside and do business, and their tortious conduct, in part, occurred in Ohio County, West Virginia, maintenance of this action in this forum will not work a substantial injustice to the Defendants and this factor weighs heavily in favor against dismissal.

(3) Whether the Alternate Forum, As a Result of the Submission of the Parties or Otherwise, Can Exercise Jurisdiction Over All the Defendants Properly Joined to the Plaintiff's Claim.

38. Because the Defendants have consented to jurisdiction in Ohio, Plaintiff does not contest this factor.

(4) The State in Which the Plaintiff Resides.

39. Ms. Scarcelli resides in Ohio and the parties do not contest this factor.

(5) The State in Which the Cause of Action Accrued.

40. While Plaintiff's cause of action initially arose from the defendant doctor's removal of the clavicle, instead of the right first rib, during a surgery in Ohio, Plaintiff alleges that Dr. Khoury also committed tortious conduct here in Ohio County, West Virginia.

41. As discussed hereinbefore, Plaintiff has alleged that the defendants have committed separate tortious acts in Ohio County, West Virginia, which support Plaintiff's claims for intentional infliction of emotional distress, misrepresentation and punitive damages. Specifically, Plaintiff alleges the misrepresentations made to Plaintiff's primary care doctor were

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committed from Dr. Khoury's office location in Wheeling, Ohio County, and Plaintiff alleges this caused further injury and harm to the plaintiff as previously set forth herein.

42. Thus, while the cause of action may have initially arose in Ohio, the fact that additional and/or separate tortious conduct is alleged to have occurred in this forum as well, renders this as a neutral factor.

(6) Whether the Balance of the Private Interests of the Parties and the Public Interest of the State Predominate in Favor of the Claim or Action Being Brought in Any Alternative Forum, Which Shall Include Consideration of the Extent to Which an Injury or Death Resulted From Acts or Omissions That Occurred in This State.

43. The balance of public and private interests weigh heavily in favor of this Court retaining this case in preference to Ohio.

44. Regarding private interest, the forum non conveniens statute requires the Court to consider (i) the relative ease of access to sources of proof; (ii) availability of compulsory process for attendance of unwilling witnesses; (iii) cost of obtaining attendance of willing witnesses; (iv) a possible view of the premises (if appropriate) and (v) all other practical problems that make trial of a case easy, expeditious and inexpensive.

45. This Court concludes that Ohio will not improve ease of access to proof.

46. The key witness, Dr. Khoury, is located in Ohio County, West Virginia, and the records from Dr. Khoury's office are also located in this forum. With respect to the remaining medical records of the Plaintiff, these records have already been provided and Plaintiff has represented to the Court that an authorization for the release of Plaintiff's records will be provided upon request of the defendants, eliminating any issue with respect to obtaining said records. As for any concern with lay witnesses and expert witnesses designated by the Plaintiff, it

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has been represented to the Court that these witnesses (as well as the Plaintiff herself), absent any unforeseen circumstances, will voluntarily appear for their depositions and trial testimony.

47. While Defendants' principally rely upon the fact that Plaintiff's treating physicians are located out of state, this fact alone is insufficient to overcome the significant private interests of the parties and public interests of this State.

48. The Defendants have offered insufficient evidence to support their speculative statements that they may have limited access to Plaintiff's treating physicians or that these health care providers will be unwilling to cooperate. Also, regardless of the state where the trial occurs, it is probable that it will be necessary to secure some third-party testimony through the usual methods of foreign depositions and/or videotape depositions to be played at trial as this is a reality commonly encountered in tort claims filed in this forum.

49. The Ohio County Courthouse is located only several miles from the Defendant's residence (4.71 miles) and his principle place of business (3.58 miles). In addition, the Ohio County Courthouse is located only several miles (3.85 miles) from where the initial malpractice took place in Belmont County, Ohio. The proximity of the Defendants' residence and principle place of business to this Court, as well as the proximity of this forum to the site of the tortious conduct (both in Ohio and West Virginia) establishes there is no reason to believe that Ohio is more convenient than West Virginia, or that a Ohio venue would result in lower costs or greater access to witnesses or evidence.

50. The parties have advised the Court that a view will not be necessary or possible, rendering that a neutral factor.

51. The balance of private interests weigh heavily in favor against dismissal.

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52. Regarding public interest, the *forum non conveniens* statute requires the Court to consider: (i) the administrative difficulties flowing from court congestion; (ii) the interest in having localized controversies decided within the state; (iii) the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and (iv) the unfairness of burdening citizens in an unrelated forum with jury duty.

53. Plaintiff intends to present evidence that Defendant Khoury, a physician and a health care provider licensed by regulatory agencies of West Virginia, violated applicable standards of care resulting in permanent injuries to the Plaintiff. Accordingly, this straightforward medical malpractice action presents no administrative difficulties for this Court.

54. The nature of the Defendants' medical practice spreads across the Ohio River and involves both patients in West Virginia and Ohio. This is a medical malpractice claim arising from alleged tortious conduct committed in both West Virginia and Ohio, involving a doctor who practices medicine in this forum. Defendants are entrusted to provide health care services to residents and citizens of West Virginia, and the public has a significant interest in holding their own residents and health care providers accountable for tortious conduct.

55. The Defendants have sought the benefits and protections of West Virginia law by seeking licensure and residency in this state and West Virginia has a great interest in deciding this matter, which involves health care being provided within the local community.

56. Likewise, it is conceivable that predicate acts to support a potential punitive damage award also occurred in this forum and West Virginia has a great interest in regulating such conduct.

57. In addition, in the event a verdict is obtained against the Defendants, the assets used to satisfy any such judgement are also located in West Virginia where the defendants are

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domiciled; further supporting that West Virginia has an interest in having this local controversy decided in this state.

58. With respect to any conflict of laws or application of Ohio law to this matter, should this Court ultimately conclude that Ohio substantive law applies to Plaintiff's claims, this Court is situated on the border of Ohio wherein many medical doctors practice in both forums, and therefore, this Court has regularly applied Ohio and/or West Virginia law to medical malpractice claims and this poses no unusual difficulty or problems for this Court.

59. Finally, any burden this straight-forward medical malpractice action might place on the courts or citizens of this state or the parties is slight, justified, and inherent in our justice system. Accordingly, this Court concludes that the citizens of West Virginia would not be unfairly burdened in light of the particular facts of this case.

60. For the reasons set forth herein, both the private and public interests weigh heavily in favor of this Court retaining this case in preference to Ohio.

(7) Whether or Not a Stay or Dismissal Would Result in Unreasonable Duplication or Proliferation of Litigation.

61. As noted, venue and jurisdiction are proper in this forum.

62. Plaintiff has incurred costs in properly filing this action in the proper forum and has further served discovery requests upon the Defendants.

63. While the Court is cognizant of the duplication of litigation, fees and costs that would be incurred to the Plaintiff if this matter were dismissed, the Court nonetheless finds that a dismissal would not result in *unreasonable* duplication or proliferation of litigation as contemplated in the *forum non conveniens* statute.

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(8) Whether the Alternative Forum Provides a Remedy.

64. Based upon the Defendants' Motion specifically stating they will waive any applicable statute of limitations defenses, Plaintiff does not contest that Ohio provides a remedy for purposes of this particular factor.

\* \* \*

65. After considering and weighing the factors set forth in the *forum non conveniens* statute, the Court concludes the Defendants have failed to establish inconvenience, let alone prejudice. Mrs. Scarcelli's choice of forum is entitled to legal deference, and there is insufficient cause to reject her choice of a forum. Accordingly, Defendants' motion to dismiss *forum non conveniens* is denied.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is accordingly, **ORDERED** that *Defendants' Motion to Dismiss this action for forum non conveniens* is denied as set forth herein. It is further

**ORDERED** that *Defendants' Motion for Protective Order* is deemed moot based upon this Court's denial of the Motion to Dismiss as set forth herein. It is further

**ORDERED** that all exceptions and objections are noted and preserved. It is further

**ORDERED** that an attested copy of this Order shall be provided to all counsel of record.

ENTERED THIS 31<sup>st</sup> day of July, 2015.

Martin J. Gaughan

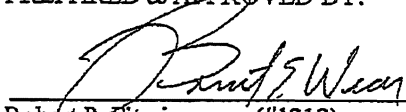
Honorable Martin J. Gaughan  
Judge of the Circuit Court  
Ohio County, West Virginia

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Brenda L. Miller  
Circuit Court

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PREPARED & APPROVED BY:



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BEW/ldt: 03-24-15

## IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

NICOLE A. SCARCELLI,

Plaintiff.

vs.

RAJAI T. KHOURY, M.D., and  
KHOURY SURGICAL GROUP, INC.,  
a West Virginia Corporation

Defendants.

CIVIL ACTION NO. 15-C-90  
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CIRCUIT COURT  
OF OHIO COUNTY  
MAR 24 PM 3 28  
BRENDA L. MILLER

### COMPLAINT

NOW COMES your Plaintiff, Nicole A. Scarcelli, and for her Complaint against the Defendants, Rajai T. Khoury, M.D., and Khoury Surgical Group, Inc., a West Virginia corporation, states and alleges as follows:

### Parties

1. Plaintiff, Nicole A. Scarcelli, is now and at all times material herein has been a resident and citizen of Trumbull County, Ohio.
2. At all times material herein, Defendant Rajai T. Khoury, M.D., (hereinafter "Dr. Khoury") was a medical doctor and health care provider who held himself out to the public as a practicing physician specializing in thoracic surgery, and who at all times material herein is and was a resident and citizen of Ohio County, West Virginia.
3. At all times material herein, Defendant Khoury Surgical Group, Inc., a West Virginia corporation (hereinafter "Defendant Corporation") was a medical physicians' group consisting of health care providers who held themselves out to the public as practicing physicians specializing in thoracic surgery, and at all times material herein conducted business in Ohio

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